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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ROBIN FREE and RENEE FREE,

Petitioners,

v.

ABBOTT LABORATORIES, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR PETITIONERS

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Petitioners Robin Free and Renee Free submit this reply brief in support of their Petition for a Writ of Certiorari.

INTRODUCTION

This Petition presents a two-two circuit split wherein the appellate courts expressly disagree whether the supplemental jurisdiction statute overrules or preserves this Court's requirement that each plaintiff or class member in a diversity case satisfy the jurisdictional minimum. Respondents deny neither the existence of this circuit split nor that a decision from this Court is necessary to end the continuing, protracted, and unproductive battles over a basic question of jurisdiction. Instead, Respondents only attempt to portray the Fifth Circuit's decision in this case ("*Abbott*") as presenting an unusual jurisdictional issue unworthy of the Court's attention. However, Respondents simply ignore the large number of cases demonstrating the frequency with which the lower federal courts face this issue.

I.

RESPONDENTS' ATTEMPT TO TRIVIALIZE THE RULE ADOPTED BY THE FIFTH AND SEVENTH CIRCUITS SIMPLY IGNORES NUMEROUS CASES AND STATUTES.

The Fifth and Seventh Circuits hold the supplemental jurisdiction statute, 28 U.S.C. § 1367, overrules *Zahn v. International Paper Co.*, 414 U.S. 291 (1973), and therefore when the claims of one plaintiff satisfy the jurisdictional minimum of 28 U.S.C. § 1332 there is supplemental jurisdiction over the claims of all other plaintiffs or class members even if they cannot satisfy the jurisdictional minimum. *In re Abbott Labs.*, 51 F.3d 524 (5th Cir. 1995); *In re Brand Name Prescription Drugs*, 123 F.3d 599 (7th Cir. 1997); *Stromberg Metal Works, Inc. v. Press Mechanical, Inc.*, 77 F.3d 928, 930 (7th Cir. 1996). As common sense suggests, it is a frequent

occurrence that not every plaintiff or class member can satisfy the jurisdictional minimum. *Zahn* itself is an example of a case in which some plaintiffs or class members satisfied the jurisdictional minimum but others did not. The same situation occurred in *Allstate, Stromberg, Leonhardt v. Western Sugar Co.*, 160 F.3d 634, 640 (10th Cir. 1998), and *Meritcare, Inc. v. St. Paul Mercury Ins. Co.*, 166 F.3d 214 (3d Cir. 1999), thus giving rise to the circuit split. It also occurred in numerous district court cases.[1]

1. *See, e.g., Allendale Mut. Life Ins. Co. v. Excess Ins. Co.*, No. 95 Civ. 10970 (SAS), 1999 WL 608788, at *9 (S.D.N.Y. Aug. 12, 1999) (non-class action in which some plaintiffs satisfied jurisdictional minimum and others did not); *City and County of San Francisco v. Hartford Life Ins. Co.*, No. C 99-0225 CRB ARB, 1999 WL 354522, at *5 (N.D. Cal. May 17, 1999) (non-class action in which a governmental plaintiff satisfied jurisdictional minimum but individual plaintiffs did not); *Casteel v. Sara Lee Corp.*, No. Civ. 99-40117, 1999 WL 382375, at *2 (E.D. Mich. June 7, 1999) (class action in which only some named plaintiffs and class members satisfied jurisdictional minimum); *Daniels v. Philip Morris Cos.*, 18 F. Supp. 2d 1110, 1115-16 (S.D. Cal. 1998) (class action in which some class members could not satisfy jurisdictional minimum); *Russ v. State Farm Mut. Auto. Ins. Co.*, 961 F. Supp. 808, 811 (E.D. Pa. 1997) (class action in which one named plaintiff satisfied jurisdictional minimum but other named plaintiffs and class members did not); *Duhaime v. John Hancock Mut. Life Ins. Co.*, 177 F.R.D. 54, 60 (D. Mass. 1997) (class action in which named plaintiffs satisfied jurisdictional minimum but class members did not); *Leszczynski v. Allianz Ins.*, 176 F.R.D. 659, 666 (S.D. Fla. 1997) (class action in which named plaintiffs satisfied jurisdictional minimum but two groups of class members did not); *Howard v. Globe Life Ins. Co.*, 973 F. Supp. 1412, 1420 (N.D. Fla. 1996) (class action in which named plaintiffs satisfied jurisdictional minimum but class members did not); *McGowan v. Cadbury Schweppes, PLC*, 941 F. Supp. 344, 347-48 & n.3 (S.D.N.Y. 1996) (class action in which named plaintiffs had the right to all attorney fees under state (Cont'd)

Respondents attempt to evade this substantial body of case law by defining the issue so narrowly as to give the appearance

(Cont'd)
law); *Bernard v. Gerber Food Prods. Co.*, 938 F. Supp. 218, 223-24 (S.D.N.Y. 1996) (same); *Gilmer v. Walt Disney Co.*, 915 F. Supp. 1001, 1012 (W.D. Ark. 1996) ("we conclude that while, while the named plaintiff's actual damages are slight, it is more likely than not that if the plaintiff prevails the punitive damages award would exceed the jurisdictional amount"); *Snider v. Stimson Lumber Co.*, 914 F. Supp. 388, 389-92 (E.D. Cal. 1996) (class action complaint alleged that named plaintiffs satisfied jurisdictional minimum and defendants contended class members did not satisfy the minimum); *Waters v. Grosfeld*, 904 F. Supp. 616, 618 (E.D. Mich. 1995) (class action in which not all class members claimed $50,000 or more in damages); *Benfield v. Mocatta Metals Corp.*, No. 91 Civ. 8255, 1993 WL 148978, at *1, 4 (S.D.N.Y. May 5, 1993) (class action in which some class members did not satisfy jurisdictional minimum); *Hairston v. Home Loan and Inv. Bank*, 814 F. Supp. 180, 181 n.1 (D. Mass 1993) (class action in which three of four named plaintiffs and many class members did not satisfy jurisdictional minimum); *Mayo v. Key Fin. Serv., Inc.*, 812 F. Supp. 277, 278 (D. Mass. 1993) (class action in which only one named plaintiff satisfied jurisdictional minimum); *Averdick v. Republic Fin. Serv., Inc.*, 803 F. Supp. 37, 45-46 (E.D. Ky. 1992) (class action in which some class members did not satisfy jurisdictional minimum), *rev'd on other grounds*, *Page v. City of Southfield*, 45 F.3d 128, 132-33 (6th Cir. 1995).

In addition, several cases hold that if Section 1367 overrules *Zahn*, then the federal policy against aggregating attorney fees for jurisdictional purposes also would be overruled and therefore named plaintiffs but not class members would satisfy the jurisdictional minimum. *Kanter v. Warner-Lambert Co.*, No. C99-1154 FMS, 1999 WL 390839, at *4 (N.D. Cal. June 9, 1999); *Crosby v. America Online, Inc.*, 967 F. Supp. 257, 262-64 (N.D. Ohio 1997); *Borgeson v. Archer-Daniels Midland Co.*, 909 F. Supp. 709, 713 (C.D. Cal. 1995); *In re Potash Antitrust Litig.*, 866 F. Supp. 406, 412 n.10, 414 n.19 (D. Minn. 1994). Only because they concluded that *Zahn* remains good law have these courts averted what Respondents term "lumpiness."

that *Abbott* stands alone. However, each of Respondents' implicit narrowing criteria defies logic and experience.

First, Respondents treat as irrelevant all case law that reached a result different from *Abbott* and *Stromberg*. (Brief in Opp. at 11) ("Abbott is a singular *result*.") (emphasis added). According to Respondents' argument, the rule of *Abbott* and *Stromberg* presents no threat of expanding jurisdiction in diversity cases because two other appellate courts and the vast majority of district courts have disagreed with *Abbott* and *Stromberg*. However, this results-oriented approach is obviously unsound. The threat of expanding jurisdiction in diversity cases was present in each of the cases holding that Section 1367 does not overrule *Zahn*.[2] Moreover, that threat has become a reality for all of the district courts in the Fifth and Seventh Circuits, which are bound to follow their circuit court rulings, and it will continue to arise in other circuits. To the extent Respondents' argument is predicated on the existence *vel non* of reported cases in the Fifth and Seventh Circuits applying *Abbott* and *Stromberg*, one would not expect to find published cases regarding a settled issue.

Second, Respondents implicitly argue the issue is limited to class action cases. But this Court's interpretation of the

2. In the Petition for Certiorari, twenty district court cases were cited as examples of cases holding that Section 1367 does not overrule *Zahn*. (Pet. For Cert. at 13-14 n.1). Petitioners mistakenly included *Universal Jewelry & Watch Repair, Inc. v. United Parcel Service, Inc.*, No. 99-70016, 1999 U.S. Dist. LEXIS 5957 (E.D. Mich. April 12, 1999); *Blair v. Source One Mortgage Services Corp.*, 925 F. Supp. 617 (D. Minn. 1996); and *Shelly v. Southern Bell Telephone & Telegraph Co.*, 873 F. Supp. 613 (M.D. Ala. 1995); upon closer examination, it is clear that these cases ultimately decline to decide the issue. There is a plethora of additional cases holding that Section 1367 does not overrule *Zahn*. *See, e.g., In re Abbott Labs.*, 51 F.3d at 528 n.8 (citing cases); *Borgeson*, 909 F. Supp. at 715-16 & nn.11, 12 (same).

diversity statute's "matter in controversy" requirement is the same in class and non-class actions. Writing for the Seventh Circuit, Judge Easterbrook explained this in *Stromberg*, a non-class action:

> The Goldwyns ask us to distinguish *Abbott Laboratories* on the ground that it, like *Zahn*, involved a class action. *Zahn* held that every member of a class must satisfy the jurisdictional minimum, and *Abbott Laboratories* concluded that under § 1367 only the named class representatives need do so. Our case, by contrast, has just two plaintiffs. But § 1367 does not distinguish class actions from other cases; neither did *Zahn*. Indeed, the point of *Zahn* was that the class device made no difference. *Snyder v. Harris*, 394 U.S. 332, 89 S.CT. 1053, 22 L.Ed.2d 319 (1969), held that Fed.R.Civ.P. 23 does not alter the rule that multiple persons' claims cannot be combined to reach the minimum amount in controversy. Then *Zahn* added that each unnamed class member must satisfy the jurisdictional amount even if the class representatives do so without aggregation. The Court started from the proposition, established in *Clark*,[3] that § 1332 applies to each party independently. See also *Scott v. Frazier*, 253 U.S. 243 (1920). *Zahn* holds that the unnamed class members remain "parties" for this purpose. In modern terms, this means that Rule 23 does not authorize pendent-party jurisdiction. See also Fed.R.Civ.P. 82 ("[t]hese rules shall not be construed to extend or limit the jurisdiction of the United States district courts"). *Zahn* added only that the status of the pendent parties as class members (rather than as named representatives) does not make a difference.

3. *Clark v. Paul Gray*, 306 U.S. 583 (1939).

77 F.3d at 931. Accordingly, in a subsequent class action, *In re Brand Name Prescription Drugs*, the same court directly applied the holding of *Stromberg*. 123 F.3d at 607 (Posner, C.J.).

Third, Respondents ignore all cases decided before *Abbott* by framing their argument in terms of whether "a court has applied the *Abbott* ruling to find federal jurisdiction . . ." (Brief in Opp. at 6). Numerous cases decided before *Abbott* had to address the same issue that is presented here. *See supra* note 1 (citing, *inter alia*, five pre-*Abbott* district court cases); *Abbott*, 51 F.3d at 528 n.8 (listing numerous district court cases addressing whether Section 1367 overrules *Zahn*); *Borgeson v. Archer-Daniels Midland Co.*, 909 F. Supp. 709, 716 & nn. 11, 12 (C.D. Cal. 1995) (same). There is no logical reason to exclude such cases in assessing the significance of the issue.

Even if one were to accept these narrowing criteria, Respondents are wrong. There are cases "in which a court has applied the *Abbott* ruling to find federal jurisdiction over a class action where such jurisdiction would not otherwise have existed." (Brief in Opp. at 6). Respondents missed at least three such cases. *See, e.g., Cunningham v. IBM*, 971 F. Supp. 1051 (M.D. La. 1997); *Kimball v. Modern Woodman of Am.*, 939 F. Supp. 479 (M.D. La. 1996); *Millet v. Marathon Oil Co.*, No. 95-1549, 1995 U.S. Dist. LEXIS 12359 (E.D. La. Aug. 16, 1995).[4]

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4. In addition, in *Brooks v. Georgia Gulf Corp.*, 924 F. Supp. 739 (M.D. La. 1996), a class action, the court held the amount in controversy to be satisfied because: (1) punitive damages can be aggregated under Louisiana law and, alternatively; (2) under *Abbott* the named plaintiff satisfied the jurisdictional minimum by virtue of the attorney fees and thus conferred supplemental jurisdiction over class members who did not. The first ground for jurisdiction in *Brooks* was overruled in *Ard v. Transcontinental Gas Pipe Line Corp.*, 138 F.3d 596, 602 (5th Cir. 1998). Thus, the only current basis for jurisdiction in *Brooks* is the rule of *Abbott* and *Stromberg*.

Respondents also err in suggesting that the Louisiana statute (Article 595) that gives rise to the unevenness here is unique among state statutes. A New York statute is nearly identical to Article 595. *See* N.Y. Civ. Prac. L. & R. § 909 (McKinney 1999) ("the court in its discretion may award attorney's fees to the representatives of the class. . . ."). The federal courts in New York have held that *Zahn* is still good law and therefore have not allowed the unevenness resulting from this statute to confer federal jurisdiction. *McGowan v. Cadbury Schweppes, PLC*, 941 F. Supp. 344, 347-48 (S.D.N.Y. 1996); *Bernard v. Gerber Food Prods. Co.*, 938 F. Supp. 218, 224 (S.D.N.Y. 1996). A Massachusetts statute provides class action attorney fees to "the petitioner," which, at Respondents' behest, has been held to mean "the *named* party plaintiff." *Boos v. Abbott Labs.* (Brief in Opp. at 38a). Respondents now contend that *Boos* was "not correct" in its conclusion that the Massachusetts law operates just like the Louisiana statute. (Brief in Opp. at 11 n.1). But Respondents are judicially estopped from making this about-face. *See Lydon v. Boston Sand & Gravel Co.*, 175 F.3d 6, 12-13 (1st Cir. 1999) (judicial estoppel prohibits party from contradicting litigation position on which it previously succeeded and should be applied "when a litigant is playing fast and loose with the courts.").

Other state statutes create rights that result in unevenness in the amount in controversy among plaintiffs or class members. *See* Fla. Stat. Ch. 627.428 (1999) (mandating award of attorney fees "in favor of any named or omnibus insured" in any judgment against insurer); *Howard v. Globe Life Ins. Co.*, 973 F. Supp. 1412, 1421 (N.D. Fla. 1996) (holding that chapter 627.428 requires attributing all fees to the named plaintiffs in a class action and finding federal jurisdiction based on *Abbott*); Conn. Gen. Stat. § 42-110g(d) ("In a class action in which there is no monetary recovery, but other relief is granted on behalf of the class, the court may award, to the plaintiff, in addition to

other relief provided in this section, costs and reasonable attorneys' fees."). It is difficult even to begin accounting for the numerous types of substantive and procedural state statutes that can have this effect, given their potential diversity. For example, in *In re Brand Name Prescription Drugs*, a state-law price fixing case by Alabama consumers of prescription drugs, the court held it was plausible that an Alabama statute allowing $500 for each instance of injury or damages could very well push at least one named plaintiff over the $50,000 threshold if a named plaintiff had made at least 100 purchases during the four-year class period; however, the defendants, who had removed the case, failed to produce evidence regarding the number of purchases so the case was remanded. 123 F.3d 607-08 ("the defendants cannot simply waive the statute in our faces"). Thus, any state law providing per-violation penalties will create unevenness in the amount in controversy among plaintiffs or class members.

In short, the cases are legion in which there is an uneven amount in controversy among plaintiffs or class members and there are numerous state statutes that cause such unevenness. This unevenness may result from the differing impact of defendants' conduct upon the plaintiffs or class members, as in *Zahn*, *Meritcare*, and *Russ v. State Farm Mut. Auto. Ins. Co.*, 961 F. Supp. 808, 811 (E.D. Pa. 1997), from the operation of various state law rights of recovery, as in *Abbott*, *Boos* (Brief in Opp. at 32a-43a), and *Howard v. Globe Life Ins. Co.*, 973 F. Supp. 1412, 1420 (N.D. Fla. 1996), or simply from a failure to meet the jurisdictional burden of proof with respect to the claims of some plaintiffs or class members. Under the rule of the Fifth and Seventh Circuits, such cases will be allowed *in toto* into federal court.

II.
RESPONDENTS' ARGUMENT ON THE MERITS IS INAPT.

Respondents have spilled much ink to establish a proposition of statutory interpretation with which no one takes issue: that an unambiguous statute generally is applied as written. Having set up a straw man by inferring that Petitioners are at odds with this proposition, Respondents proceed to knock it down repeatedly. What they have missed, however, is that numerous courts have recognized this same principle of statutory interpretation while concluding that Section 1367 does not overrule *Zahn*.

For example, the Tenth Circuit held that Section 1367 is unambiguous and that it preserves, not overrules, *Zahn*. *Leonhardt v. Western Sugar Co.*, 160 F.3d 631, 640 (10th Cir. 1998) ("In our view a literal and textually faithful reading of § 1367(a) leads to the opposite conclusion from that of the Fifth and Seventh Circuits."). Other courts also have held section 1367 to be unambiguous in its preservation of *Zahn*. *See, e.g., Crosby v. America Online, Inc.*, 967 F. Supp. 257, 263 n.4 (N.D. Ohio 1997); *Borgeson v. Archer-Daniels Midland Co.*, 909 F. Supp. 709, 716 (C.D. Cal. 1995). These cases focus on subsection (a) of Section 1367 and hold that Congress did not alter the long-standing meaning of the diversity statute's "matter in controversy" requirement. Respondents never attempt to address this issue but rush headlong into an extended discussion of whether "Rule 23" of the Federal Rules of Civil Procedure should be read into the exceptions listed in subsection (b).

Further, there are important exceptions to the principle of statutory construction relied upon by Respondents. The Third Circuit held that the proper construction of Section 1367 requires the application of one such exception:

> Even were we to conclude that Section 1367 is unambiguous, as *Abbott Laboratories* read it, we would nevertheless turn to the legislative history because this is one of those "rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters." *United States v. Sherman*, 150 F.3d 306, 313 (internal quotation marks removed, alterations in original); see also *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989) (same).

Meritcare Inc. v. St. Paul Mercury Ins. Co., 166 F.3d 214, 222 (3d Cir. 1999). This exception is well-established by this Court. *See, e.g., Griffin v. Ocean Contractors, Inc.*, 458 U.S. 564, 571 (1982) ("[I]n rare cases the literal application of a statute will produce results demonstrably at odds with the intentions of its drafters, and those intentions must be controlling."). Here, there is no doubt, and Respondents do not contest, that Congress meant to preserve *Zahn*.

In short, *Leonhardt*, *Meritcare* and similar cases demonstrate that Respondents are simply wrong in stating that the principle of statutory construction on which they rely is "dispositive" of the issue presented. (Brief in Opp. at 15).

Finally, Respondents' contention that the meaning of Section 1367 is obvious flatly conflicts with the view of the large number of courts that either disagree with Respondents' reading or conclude the statute is ambiguous. Respondents wrongly suggest that the large number of cases disagreeing with their interpretation is utterly meaningless. What those cases demonstrate is that the meaning of Section 1367 is not as obvious as Respondents contend and that resolution of the divergent views on this jurisdictional issue by this Court is needed.

CONCLUSION

For these reasons, as well as those stated in the Petition, the writ of certiorari should be granted.

Respectfully submitted,

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